

## Staff Summary Report

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Council Meeting Date: 12/04/03

Agenda Item Number: 18

**SUBJECT:** Request approval of a Consent to Retailer Designation and Assignment Agreement between Tait Development, Inc. and Ikea Property, Inc.

**DOCUMENT NAME:** 20031204casv01     **DEVELOPMENT PROJECT (0406)**

**SUPPORTING DOCS:** No.

**COMMENTS:** N/A

**PREPARED BY:** Marlene A. Pontrelli, City Attorney (350-8120)

**REVIEWED BY:** Jan Schaefer, Economic Development Director (350-8036)

**LEGAL REVIEW BY:** N/A

**FISCAL NOTE:** Not applicable

**RECOMMENDATION:** Authorize the Mayor to execute the Consent to Retailer Designation and Assignment Agreement between Tait Development, Inc. and Ikea Property, Inc. Additionally, authorizing Tait Development, Inc. and Ikea Property, Inc. to attach an original executed Consent to each fully executed Retailer Designation and Assignment Agreement in their respective possessions.

**ADDITIONAL INFO:** By execution of the Consent, the City is acknowledging and consenting to IKEA being designated as the Retailer under the Development Agreement between Tait Development, Inc. and the City dated 7/17/03 and is agreeing to IKEA being entitled to the exercise of rights and receiving the benefits available to the Retailer under the Development Agreement.

## CONSENT

By execution of these presents, the City of Tempe, Arizona, a municipal corporation ("**City**"), hereby approves the Retailer Agreement, to which this Consent is attached, including, without limitation, the City acknowledging and consenting to IKEA being designated as the "Retailer" under the Development Agreement between Tait Development, Inc. and the City of Tempe dated as of July 17, 2003 ("**Development Agreement**") and agreeing to IKEA being entitled to the exercise the rights and receive the benefits available or otherwise inuring to the "Retailer" under the Development Agreement (including, without limitation, the Retailer's Rights) and as described in Section 1 of the aforesaid Retailer Agreement. In addition, the City agrees to the provisions of Section 12 of the aforesaid Retailer Agreement and that the obligations of the Developer, Master Developer (as such term is defined in the Development Agreement) and the City are independent covenants and no default or breach of the Development Agreement by Developer shall in any way affect IKEA's rights to the payments to be made to the Retailer under Article 9 of the Development Agreement or any of the other Retailer's Rights.

The City hereby represents and warrants that (a) it has no knowledge of any prior designation of a party as a retailer under the Development Agreement or Developer's grant, hypothecation or other transfer of any of Developer's interests in the Development Agreement regarding the IKEA Parcel or the Retailer's Rights, (b) the Development Agreement is in full force and effect and has not been amended or modified except for any amendment disclosed on Exhibit B attached hereto, and (c) it has no knowledge of any default under the Development Agreement or of any matter that currently exists that, by the mere passage of time or giving of notice or both, will become a default under the Development Agreement. Capitalized terms not otherwise defined herein shall have the same meanings as are ascribed to them in the aforesaid Retailer Agreement.

**IN WITNESS WHEREOF**, the City of Tempe, Arizona, a municipal corporation, hereby has executed this Consent as of the \_\_\_\_ day of December, 2003.

**CITY OF TEMPE, ARIZONA**, a municipal corporation

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

APPROVED AS TO FORM

\_\_\_\_\_

STATE OF ARIZONA                     )  
   ) ss.  
County of Maricopa                     )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of December, 2003, by Neil G. Giuliano, Mayor of the CITY OF TEMPE, ARIZONA, a municipal corporation, for and on behalf thereof.

**Notary Public**

My Commission Expires:

**Exhibit "B"**

**List of Amendment(s) to Development Agreement**

**NONE**

## RETAILER DESIGNATION AND ASSIGNMENT AGREEMENT

THIS RETAILER DESIGNATION AND ASSIGNMENT AGREEMENT (the “**Retailer Agreement**”) is made as of November \_\_, 2003, by and between TAIT DEVELOPMENT, INC., an Arizona corporation, having its address at c/o Tom Tait, 777 East Thomas Rd., Suite 210, Phoenix, AZ 85014 (“**Developer**”), and IKEA PROPERTY, INC., a Delaware corporation, having an address at 496 West Germantown Pike, Plymouth Meeting, PA 19462 Attn: President (“**IKEA**”).

### R E C I T A L S:

- A. Whereas, Developer and the City of Tempe, Arizona (the “**City**”) executed and delivered that certain Development Agreement dated as of July 17, 2003, (the “**Development Agreement**”) pursuant to which, among other things, the City agreed to provide certain economic incentives and benefits to Developer and the “**Retailer**” (as defined in the Development Agreement) subject and pursuant, to the provisions of the Development Agreement;
- B. Whereas, the effectiveness of the Development Agreement was contingent upon the execution of a purchase agreement between Developer and “**Retailer**” (as defined in Recital G of the Development Agreement) for a portion of the “**Property**” (as defined in the Development Agreement and defined herein as “**Property**”) within the time period required therein;
- C. Whereas, Developer and IKEA have made, executed and delivered that certain Agreement of Sale dated as of August 14, 2003, (the “**Agreement of Sale**”) pursuant to which, among other things, Developer agreed to convey title to a portion of the Property to Retailer pursuant to the provisions of the Agreement of Sale, which portion of the Property is generally identified on Exhibit B to the Development Agreement as “*Lot 1A*”, and as more particularly defined in the Agreement of Sale as the “*Property*” and described on **Exhibit A** attached hereto (“**IKEA Parcel**”);
- D. Whereas, the parties intend to enter into this Retailer Agreement to agree that IKEA satisfies the criteria for being the “**Retailer**” under the Development Agreement and is hereby acknowledged and designated as the “**Retailer**” under the Development Agreement upon the terms and provisions contained herein, and accordingly, IKEA is entitled to all rights, title, interests and benefits provided or otherwise inuring to the “**Retailer**” under the Development Agreement;
- E. Whereas, Developer and IKEA acknowledge that the execution and delivery of this Retailer Agreement by the parties hereto, which shall be approved by the City is a closing document and condition required pursuant to Section 9.2.5 of the Agreement of Sale; and

- F. Whereas, simultaneously with the effective delivery of this Retailer Agreement, IKEA is acquiring title to the IKEA Parcel.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the premises it is agreed by and between Developer and IKEA as follows:

1. **Retailer Designation.** IKEA is the “retailer” as referred to in the Development Agreement and defined under Recital G of the Development Agreement as the “Retailer” (“**Retailer**”). The parties hereto (along with the City by signing the acknowledgment attached hereto) acknowledge and agree, that notwithstanding anything to the contrary, there is only one entity intended under the Development Agreement to be the Retailer thereunder and otherwise entitled to the benefit of the retailer provisions thereunder, and that entity is IKEA; provided, however, that nothing contained in the preceding sentence shall be deemed a derogation of Developer’s rights under Article 9.3 of the Development Agreement so long as any action taken by Developer thereunder does not affect the obligations of IKEA or its Retailer’s Rights. Accordingly, IKEA is entitled to all rights, title, interests and benefits provided or otherwise inuring to the “Retailer” under the Development Agreement. IKEA is further entitled to the rights to utilize the “**Underground Drain**” (as defined in Article 8 of the Development Agreement) as described in said Article 8 with respect to the IKEA Parcel and the right for expedited reviews and inspections as described in Article 10 of the Development Agreement with respect to the IKEA Parcel (collectively, the “**Article 8 and 10 IKEA Parcel Rights**”). Subject to the provisions of Section 3 below, Developer shall not designate any other party as the Retailer under the Development Agreement.

2. **Assignment.** Developer hereby assigns to IKEA, and IKEA hereby accepts the assignment of, all rights, title and interests of the Retailer under the Development Agreement and the Article 8 and 10 IKEA Parcel Rights (“**Retailer’s Rights**”), including without limitation, those rights and benefits available to the Retailer under Articles 5, 8, and 10 of the Development Agreement (with respect to the IKEA Parcel only) and those rights and benefits available to the Retailer under Article 9 of the Development Agreement, to have and to hold unto IKEA, its successors and assigns subject to Section 11.16 of the Development Agreement, all of such rights, title and interests, effective as of the date hereof (“**Effective Date**”), subject, however, to the provisions of Section 3 below.

3. **Revocation Events.** Upon the occurrence of any one of the events hereinafter set forth in clause (a), (b), or (c) of this Section 3 (each a “**Revocation Event**”), Developer shall, so long as such event continues to exist, be entitled, by written notice to IKEA, to revoke its designation of IKEA as the Retailer and IKEA shall relinquish and re-assign to Developer IKEA’s rights as the Retailer under the Development Agreement, including the IKEA’s Retailer’s Rights but excluding the Article 8 and 10 IKEA Parcel Rights. From and after the date of Developer’s written notice of revocation of designation given to IKEA in accordance with this Section 3, IKEA shall no longer be the Retailer. In the event any Revocation Event shall occur and be continuing and Developer has not exercised its right to revoke the IKEA’s designation as Retailer within thirty (30) days after the date on which such Revocation Event has occurred, then IKEA at any time thereafter, shall be entitled to give a written “Wake-Up Notice”

to Developer notifying Developer of its failure to exercise its right and specifying that if Developer fails to exercise such right within fifteen (15) days after the date of Developer's receipt of such written "Wake-Up Notice," Developer shall be deemed to have waived Developer's right to revoke the designation and in the event Developer so fails to exercise its right to revoke the designation within such 15-day period as aforesaid, Developer's right to revoke such designation shall be deemed waived as to such Revocation Event. The events are as follows:

- a. IKEA fails to commence construction not later than February 14, 2005 of an IKEA furniture store containing not less than 300,000 square feet and offering for sale the same or substantially the same items as all, or substantially all other IKEA furniture stores in the United States of America ("**IKEA Store**").
- b. IKEA fails to open the IKEA Store for business to the public as a fully stocked and staffed IKEA Store not later than July 31, 2006 ("**Outside Opening Date**"), subject to extension if IKEA is delayed in completing construction as a result of "Force Majeure" (defined below) not exceeding three hundred sixty five (365) days. For purposes of this Agreement, the term "**Force Majeure**" shall mean and include any act of God, strike, lockout or other material labor troubles, delay by any Governmental Authority, inability to procure materials, unforeseeable restrictive governmental laws or regulations or those enacted after the fact, adverse weather, casualty, condemnation, delay by the other party, war, riot, insurrection, or other cause beyond the reasonable control of the party obligated to perform; provided, however, that lack of funds or other financial inability shall not constitute force majeure.
- c. If any one or more of the following events shall occur: (1) IKEA opens for business to the public by the Outside Opening Date but closes for business for a period in the aggregate in excess of thirty (30) days ("**IKEA Store Closing**") other than an "Excused Closure" (defined below), within five (5) years after the date the IKEA Store initially opened for business ("**Five Year Operating Period**"), or (2) the IKEA Store is closed beyond the maximum period permitted for an Excused Closure during the Five Year Operating Period. For purposes of this Agreement, an "**Excused Closure**" shall mean: (i) temporary periods, not exceeding one hundred eighty (180) days duration (in the aggregate), during which the IKEA Store may be closed for substantial alterations, remodeling and/or refixturing, and (ii) temporary periods not exceeding three hundred sixty five (365) days during which the IKEA Store cannot be opened and operated practicably due to fire, earthquake or other casualties, condemnation or other reasons of Force Majeure, provided that IKEA shall notify Developer of such circumstances within ten (10) days after having actual knowledge or notice of same and that IKEA shall diligently

use commercially reasonable efforts to resume operations in the IKEA Store as soon as practicable after the closure.

4. **Developer's Representation and Warranties.** Developer represents and warrants that: (a) it has not made any prior designation of a party as a retailer under the Development Agreement nor has it granted, sold, pledged, hypothecated or otherwise transferred any of its interests in the Development Agreement regarding the IKEA Parcel or the Retailer's Rights thereunder, (b) the Development Agreement is in full force and effect and has not been amended or modified except for any amendment disclosed on **Exhibit B** attached hereto, (c) to Developer's knowledge there is no default under the Development Agreement by Developer, and to Developer's knowledge there is no default thereunder by the City, and (d) to Developer's knowledge, no matter currently exists that, by the mere passage of time or giving of notice or both, will become a default under the Development Agreement by either Developer or, to Developer's knowledge, the City.

5. **Notices.** (a) Any "Notices" (as defined under the Development Agreement) under the Development Agreement shall also be delivered to IKEA at the addresses provided below for IKEA (unless changed in the manner permitted under Section 11.1.1 of the Development Agreement) in the manner for giving of Notices under said Section 11.1.1 and shall be effective as provided under Section 11.1.2 of the Development Agreement.

(b) All notices and other communications hereunder shall be in writing (whether or not a writing is expressly required hereby), and shall be deemed to have been given and become effective (a) if by either party or its counsel via an express mail service or via courier, then if and when delivered to and received (or refused) by the respective parties at the below addresses (or at such other address as a party may hereafter designate for itself by notice to the other party as required hereby), or (b) if sent via certified mail by either party or its counsel, then on the next business day following the date on which such communication is deposited in the United States mails, by first class certified mail, return receipt requested, postage prepaid, and addressed to the respective parties at the below addresses (or at such other address as a party may hereafter designate for itself by notice to the other party as required hereby):

If to Developer:

Tait Development, Inc.  
777 East Thomas Road  
Suite 210  
Phoenix, AZ 85014  
Attn: Tom Tait  
Phone: (602) 279-3999

with a required copy to:

Mohr, Hackett, Pederson, Blakley and Randolph, P.C.  
2800 North Central Avenue  
Suite 1100



Phoenix, Arizona 85004  
*Attn:* Gordon A. Mohr, Esq.  
Phone: (602) 240-3031

If to IKEA:

IKEA Property, Inc.  
496 West Germantown Pike  
Plymouth Meeting, PA 19462  
*Attn:* President  
Phone: (610) 834-0180

with a required copy to:

IKEA Property, Inc.  
3350 Brunell Drive  
Oakland, CA 94602  
*Attn:* Doug Greenholz  
Phone: (510) 530-8630

and another required copy to:

Marvin, Larsson, Henkin & Scheuritzel  
Centre Square West  
Suite 3510  
1500 Market Street  
Philadelphia, PA 19102  
*Attn:* David J. Larsson, Esq.

6. **Attorneys' Fees.** In any dispute or action between the parties arising out of this Retailer Agreement the prevailing party shall be entitled to have and recover from the other party all losses, damages, costs and expenses (including court costs and reasonable attorneys' fees) related thereto, whether by final judgment or by out of court settlement.

7. **Governing Law.** This Retailer Agreement shall be governed by the law of the State of Arizona, and shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

8. **Computation of Time.** In computing any period of time pursuant to this Retailer Agreement, the day of the act or event from which the designated period of time begins to run will not be included. The last day of the period so computed will be included, unless it is a Saturday, Sunday or legal holiday in Tempe, Arizona or Washington, D.C., in which event the period runs until the end of the next day which is not a Saturday, Sunday or such legal holiday.

9. **Time of the Essence.** All times, wherever specified herein for the performance by Developer or IKEA of their respective obligations hereunder, are of the essence of this Retailer Agreement.

10. **Entire Agreement and Modification.** This Retailer Agreement sets forth all of the promises, covenants, agreements, conditions and undertaking between the Developer and IKEA with respect to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written, except as contained herein. This Retailer Agreement may not be changed orally but only by an agreement in writing, duly executed by or on behalf of the party or parties against whom enforcement of any waiver, change, modification, consent or discharge is sought.

11. **Successors and Assigns.** The provisions hereof are binding upon and inure to the benefit of the parties hereto and their respective successors in interest and assigns.

12. **Notice of Assignment; Amendment or Termination of Development Agreement.** Developer agrees that no actual written amendment of the Development Agreement itself will be entered into by Developer and the City (or otherwise be binding upon IKEA) in the event that such amendment would diminish any Retailer's Rights under the Development Agreement or would increase the obligations of Retailer under the Development Agreement or would otherwise materially or adversely affect the IKEA Parcel nor shall any termination of the Development Agreement due to a default that is not the fault of IKEA, be binding upon IKEA or otherwise affect IKEA's rights, without IKEA's prior written consent in each instance. In addition, IKEA agrees that no actual written amendment to the Development Agreement itself relating to the Retailer's Rights will be entered into by IKEA and the City (or otherwise be binding upon the Developer) in the event that such amendment would diminish any Retailer's Rights under the Development Agreement or would increase the obligations of Retailer under the Development Agreement or diminish any of Developer's rights under the Development Agreement or increase the obligations of Developer under the Development Agreement or otherwise materially and adversely affect the Property (and for this purpose the Property excludes the IKEA Parcel) without Developer's prior written consent in each instance.

13. **Construction.** Whenever in this Agreement: (i) the words "*herein*," "*hereunder*," "*hereinabove*," "*hereinafter*," or similar words are used, the same shall be deemed to refer to this entire Agreement (including the Exhibits incorporated herein by reference), unless expressly stated to the contrary, and (ii) the terms "*include*," "*including*" and words of similar import shall be construed as if followed by the phrase "without limitation." This Agreement shall not be interpreted or construed more strictly against one party or the other merely by virtue of the fact that it was drafted by counsel to Developer or IKEA; it being hereby acknowledged and agreed that Developer and IKEA have both contributed materially and substantially to the negotiations and drafting of this Agreement.

14. **Headings.** The headings preceding the text of the paragraphs and subparagraphs hereof are inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

15. **Recording.** Neither Developer or Retailer shall record this Agreement; however, upon the request of either party hereto, the other party shall join in the execution of a memorandum of agreement for the purposes of recordation, which recordation charges shall be at sole cost and expense of the party causing the recordation, the form and content of which shall be subject to the prior mutual approval of the parties (not to be unreasonably withheld, conditioned or delayed). In the event that IKEA's designation as the Retailer is revoked in accordance with the provisions of Section 3 above, then IKEA agrees to execute, in recordable form, at the request of Developer, a notice confirming that IKEA is no longer the Retailer and is no longer entitled to the rights and benefits of the "Retailer" under the Development Agreement."

16. **Estoppel.** From time to time, upon written request of a party hereto, the other party shall, without charge, within fifteen (15) business days after receipt of such request, execute and deliver to the other party estoppel certificates which shall confirm to the best of such party's actual knowledge (or specifically identify any exceptions or qualification), such matters as may be reasonably requested, including, without limitation, whether as of the date of the Estoppel, any Revocation Event has expired or been deemed waived.

IN WITNESS WHEREOF, the parties herein have executed this Recognition Agreement as of the day and year first above written.

**TAIT DEVELOPMENT, INC.,** an Arizona  
corporation

**IKEA PROPERTY, INC.,** a Delaware  
corporation

By: \_\_\_\_\_  
Tom Tait  
Its: President

By: \_\_\_\_\_  
Its: \_\_\_\_\_

## Acknowledgment

By execution of these presents, the City of Tempe, Arizona, a municipal corporation ("City"), hereby acknowledges the Retailer Agreement, to which this Acknowledgment is attached, including, without limitation, the City acknowledging and consenting to IKEA being designated as the "Retailer" under the Development Agreement between Tait Development, Inc. and the City of Tempe dated as of July 17, 2003 ("**Development Agreement**") and acknowledging that IKEA is entitled to the exercise the rights and receive the benefits available or otherwise inuring to the "Retailer" under the Development Agreement including, without limitation, the Retailer's Rights and as described in Section 1 of the aforesaid Retailer Agreement. In addition, the City acknowledges that the obligations of the Developer, Master Developer (as such term is defined in the Development Agreement) and the City are independent covenants and no default or breach of the Development Agreement by Developer shall in any way affect IKEA's rights to the payments to be made to the Retailer under Article 9 of the Development Agreement or any of the other Retailer's Rights.

The City hereby represents and warrants that (a) it has no knowledge of any prior designation of a party as a retailer under the Development Agreement or Developer's grant, hypothecation or other transfer of any of Developer's interests in the Development Agreement regarding the IKEA Parcel or the Retailer's Rights, (b) the Development Agreement is in full force and effect and has not been amended or modified except for any amendment disclosed on **Exhibit B** attached hereto, and (c) it has no knowledge of any default under the Development Agreement or of any matter that currently exists that, by the mere passage of time or giving of notice or both, will become a default under the Development Agreement. Capitalized terms not otherwise defined herein shall have the same meanings as are ascribed to them in the aforesaid Retailer Agreement.

Further, the City acknowledges that this Acknowledgement shall be deemed to satisfy the requirement under Section 11.16 of the Development Agreement for the delivery of the notice of assignment of the rights of the Developer to the Retailer.

**IN WITNESS WHEREOF**, the City of Tempe, Arizona, a municipal corporation, hereby has executed this Acknowledgment as of the \_\_\_\_ day of November, 2003.

**CITY OF TEMPE, ARIZONA**, a municipal corporation

By: \_\_\_\_\_

Name:

Title: City Manager, Tempe, Arizona

ATTEST:

\_\_\_\_\_

APPROVED AS TO FORM

\_\_\_\_\_

STATE OF ARIZONA                    )  
  ) ss.  
County of Maricopa                    )

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of September, 2003, by  
\_\_\_\_\_, \_\_\_\_\_ of the CITY OF TEMPE, ARIZONA, a municipal  
corporation, for and on behalf thereof.

\_\_\_\_\_  
Notary Public

My Commission Expires:

## **LIST OF EXHIBITS**

**Exhibit “A” – Legal Description of the IKEA Parcel**

**Exhibit “B” – List of Amendment(s) to Development Agreement**

**EXHIBIT A**

**Legal Description of the IKEA Parcel**

Lot 1A, A Replat of Lot 1, Amended Final Plat for 'The Emerald' A Replat of Lot 1, according to Book \_\_\_\_ of Maps, page, \_\_\_\_, records of Maricopa County, Arizona.